Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-1843

MARGARET OLLESTEAD, MARY VAN WINKLE,
KATHERINE O. SOWELL, OLIVE KAPUS,
and EMIL A. FONDAHN,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,
a Federal corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RUSSELL E. MULDER
Carr-Gottstein Building
310 K Street, Suite 403
Anchorage, Alaska 99501

WILLIAM J. DONOHUE
Carr-Gottstein Building
310 K Street, Suite 403
Anchorage, Alaska 99501

October 14, 1977

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The Respondent, Native Village of Tyonek, prays that the petition for writ of certiorari submitted in this case be denied.

REASONS FOR DENYING THE WRIT

1. FEDERAL FORUM AVAILABLE

Petitioners, at page 5 of their Brief, suggest as follows:

> The conclusion which must be drawn if these decisions are correct is that there does not exist any forum in which these citizens may obtain an adjudication of whether they are entitled to be members of the Tyonek Tribe and to the benefits of such membership, whatever they may be.

This contention is clearly incorrect. There is a federal forum available. Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973). Thus the "access to courts" argument by petitioner is clearly without merit. The Laramie case, supra, involved an action very similar to the case at bar. The appealing plaintiffs were children of a woman who was a member of the Colville Confederated Tribe of Indians. They sought to be enrolled as members of the tribe. The trial court judge dismissed the action, relying on the Fondahn case, supra. In reversing the decision of the trial court, the Court states as follows at page 316 of the Opinion:

> Plaintiffs claim that violation of the so-called Indian Bill of Rights, 25 U.S.C. 1301-1303, enacted in 1968 (82 Stat. 77), gives rise to a civil action and that 28 U.S.C. 1343(4) confers jurisdiction on the District Court. We agree. We have recently so held. Johnson v. Lower Elwha Tribal Community, 9 Cir. 1973, 484 F.2d 200 (1973). . . . Our decision in Fondahn, supra, is not to the contrary. . . . The statute was not brought to our attention, and we did not even purport to decide what its effect on jurisdiction might be. . . .

The Supreme Court of Alaska in the instant case noted, at Footnote 11 in the Opinion, as follows:

> Plaintiffs argue that a decision denying them access to state courts prevents them from securing a hearing in any forum. The decision in Fondahn v. Native Village of Tyonek, supra, would indicate an absence of federal jurisdiction. But as discussed previously, the United States Court of Appeals for the Ninth Circuit has clearly stated that the Fondahn case was based on the law prior to the enactment of the so-called Indian Bill of Rights, including 25 U.S.C. 1302(8), and that the United States District Court has jurisdiction of such cases alleging denial of equal protection of deprivation of due process. (citing cases) Thus if plaintiffs have an equal protection or due process claim, a federal forum is available to them (see Petitioners' Brief at page A-9).

Respondents respectfully submit that the above-quoted statement from page 5 of the instant brief by petitioners is totally without merit, and a federal forum does exist for resolution of the instant dispute.

II. FEDERAL FORUM PREFERABLE

The Supreme Court for the State of Alaska held, and apparently petitioners do not disagree with this holding, that Indian affairs are subject to state law, but only to the extent that Congress explicitly so provides. Bryan v. Itasca County, 48 L.Ed.2d 710 (1976). For the following reasons, respondent respectfully submits that the federal forum is the preferable forum in order to adjudicate the relief requested by the petitioners in this case.

A. PETITIONERS' REQUEST CANNOT BE FULLY GRANTED BY THE COURTS OF THE STATE OF ALASKA DUE TO THE PROVISIONS OF 28 U.S.C. 1360(b).

The request of the petitioner, in a nutshell, is set forth at page 11 of their Brief as follows:

> They have merely requested a judicial determination that they are in fact members of the Native Village of Tyonek, entitled to the use and possession of tribal lands and assets on the same basis as other members of the tribe.

Thus, in order for the Courts of the State of Alaska to grant petitioners complete relief, the declaration would, of necessity, include a declaration concerning the petitioners' entitlement to the use and possession of tribal lands. It is submitted that the Courts for the State of Alaska are without jurisdiction to grant this relief. 28 U.S.C. 1360(b) provides, in pertinent part, as follows:

> . . . or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

It is therefore clear that the Courts of the State of Alaska would be without jurisdiction to grant complete relief to petitioners, even if the question of "bare membership" were resolved and a State Court judgment to this effect were obtained.

B. A STATE COURT DETERMINATION OF "MEMBERSHIP" ALONE WOULD EITHER BE VIOLATIVE OF 28 U.S.C. 1360(b) OR WOULD BE A USELESS ACT.

The Alaska Supreme Court, in its wisdom, looked to the nature of the relief requested by the petitioners herein and found that the only property at issue is land set aside by Executive Order 2141 and the proceeds from the oil and mineral leases of that property. The Alaska Supreme Court examined this property and found that, indeed, such property was in fact subject to a restriction against alienation imposed by the United States, thus triggering the exclusionary provisions of 28 U.S.C. 1360(b). Since the Alaskan State Court adjudication of "bare membership" would be of neces-

State Court adjudication of "bare membership" would of necessity carry with it a proviso limiting the effect of any such judgment, so as not to conflict with 28 U.S.C. 1360(b), it appears that the granting of such a judgment would be a useless act. In the federal forum, wherein the question as to petitioners' right to use and possession of federal lands would be adjudicated, the State Court judgment as to tribal membership would, of necessity, have no res judicata effect. It is submitted that the question of tribal membership would have to be relitigated in the federal forum, for if the State Court judgment as to membership were given any res judicata effect, then the Village could correctly argue that 28 U.S.C. 1360(b) had been violated.

Of course, petitioners might argue that such a State Court judgment, although not binding, may be considered by the federal

court as one of the "factors" in resolving the true issues presented by the instant petition, it appears that a full resolution of the problem cannot be had in the state courts. Clearly, the federal forum is the correct forum.

As noted by petitioners at pages 9 and 10 in their Brief, the Secretary of the Interior should be made a party if the issues presented are to be fully and finally adjudicated. If the Secretary of Interior is a proper party, then the provisions of Alaska Civil Rule 19 would apply. Since the Secretary of Interior may not be made a party to the lawsuit in state court, the state court judgment would not in any way affect the Secretary's rights or liabilities. See Alaska Civil Rule 19(b).

This is but another reason why the federal forum would be preferable to adjudication of the questions presented by the instant Petition for Certiorari.

III. CONCLUSION

In conclusion, it is submitted that the true underlying justifications set forth by Petitioners for the grant of certiorari in this case is incorrect. That assertion is that there does not exist any forum in which plaintiffs may obtain an adjudication of whether they are entitled to be members of the Tyonek tribe and to the benefits of such membership. This issue may be resolved in the federal courts. Petitioners have supplied this Court with no justification for failing to pursue the case in federal court other than the dismissal of a similar case. See Fondahn v. Native Village of Tyonek, 450 F2d 520 (9th Cir. 1971). In the Fondahn case, however, the argument presently set forth by petitioners was not made.

The Petition should also be denied for the reason that any state court adjudication concerning tribal membership would, of necessity, carry with it a determination as to rights in property held in trust for the Indians by the United States. Thus the state court lacks jurisdiction due to the provisions of 28 U.S.C. 1360(b).

Respondent submits that any adjudication by the Alaskan

State Courts concerning tribal membership would, of necessity, violate 28 U.S.C. 1360(b). If there exists any independent reason for the application of 28 U.S.C. 1360(a), respondent submits that petitioners have failed to adequately set forth this reason in their Petition. Additionally, respondents submit that such a result in this case would simply serve to further confuse and protract the litigation due to the lack of jurisdiction in the state courts over certain other parties which are clearly indispensable to the issues presented.

For the reasons stated, respondents respectfully urge that the Petition for Writ of Certiorari to the Supreme Court of the State of Alaska be denied.

Respectfully submitted,

RUSSELL E. MULDER
Carr-Gottstein Building
310 K Street, Suite 403
Anchorage, Alaska 99501

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Carr-Gottstein Building
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